Ref: 3317/15/251

320.1

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No 41661/15

In the matter between:

Chamber of Mines South Africa	Applicant
and	
Minister of Mineral Resources	First respondent
and	
Director-General, Department of Mineral Resources	Second respondent

FILING SHEET: APPLICANT'S REPLYING AFFIDAVIT

Presented for filing: Applicant's replying affidavit

Signed at **Sandton** on **10th** day of **September** 2015

Naidoo

Norton Rose Fulbright South Africa Inc
Attorneys for applicant
15 Alice Lane
Sandton
Tel: 011 685 8500
Fax: 011 301 3200
Email: andre.vos@nortonrosefulbright.com
denushka.naidoo@nortonrosefulbright.com
c/o Mothle Jooma Sabdia Inc
Ground Floor
Duncan Manor
Cnr Jan Shoba (Duncan) and Brooks Street
Brooklyn
Pretoria
Tel: 012 363 3137
Fax: 012 362 4139
Email: ebrahimJ@mjs-inc.co.za

To:
The Registrar of the High Court

And to:
The Minister of Mineral Resources
Department of Mineral Resources
First Respondent
2nd Floor, Block 2B
Travenna Campus
71 Meintjies Street
Cnr Meintjies and Frances Baard
(formerly Schoeman) Streets
Sunnyside, Pretoria
c/o The State Attorney
8th Floor, Manaka Heights
167 Andries Street
Pretoria
Tel: 012 309 1500
Fax: 012 328 2663

STAATSPROKUREUR
PRIVAATSAK/PRIVATEBAG X91
PRETORIA 0001
2015 -09- 11
STATE ATTORNEY

WITHOUT PREJUDICE

Received on ____ September 2015

For: First Respondent

And to:

Director-General: Department of Mineral Resources
Second Respondent
2nd Floor, Block 2B
Travenna Campus
71 Meintjies Street
Cnr Meintjies and Frances Baard (formerly Schoeman) Streets
Sunnyside, Pretoria
c/o The State Attorney
8th Floor, Manaka Heights
167 Andries Street
Pretoria
Tel: 012 309 1500
Fax: 012 328 2663

STAATSPROKUREUR
PRIVAATSAK/PRIVATEBAG X91
PRETORIA 0001
2015 -09- 11
STATE ATTORNEY

WITHOUT PREJUDICE

Received on _____ September 2015

For: Second Respondent

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no:

In the matter between:

The Chamber of Mines of South Africa Applicant

and

Minister of Mineral Resources First Respondent

Director-General, Department of Mineral Resources Second Respondent

---

REPLYING AFFIDAVIT

I, the undersigned

Ambrose Vusumuzi Richard Mabena

hereby say on oath that:

1 **Introduction**

1.1 I am the deponent to the founding affidavit. I am authorised by the applicant to depose to this affidavit and to reply to the answering affidavit of second respondent, Thibedi Ramontja filed on behalf of both the respondents. I shall in this affidavit refer to the second respondent as

AMCM. S.C.

"the DG" and the first respondent as "the Minister". I shall refer to them collectively as "the respondents".

1.2 The facts in this affidavit are true and correct and, unless otherwise stated or the contrary appears from the context, within my personal knowledge. Legal submissions in this affidavit are made on the advice of the Chamber's legal advisors.

1.3 Where I define a term in the founding affidavit, I use the same definition in this affidavit.

1.4 Allegations contained in the respondents' affidavit that are not admitted should be taken to be denied.

2 **The ambit of the dispute confirmed**

2.1 At the outset, I point out that it is confirmed in paragraph 126 of the respondents' affidavit that this application is brought by agreement between the parties in order to resolve a number of interpretative disputes between them.

2.2 Three of the disputes relate to the interpretation of the relevant provisions of the MPRDA and the Charters. The respondents confirm in paragraphs 126 to 144 of their affidavit that the disputes between the Chamber and the respondents have been correctly captured in the founding affidavit. In relation to these disputes, the Chamber asks for the Court to pronounce on the proper interpretation of the relevant provisions of the MPRDA and Charters.

2.3 The fourth dispute is about provisions of the 2010 Charter. The Chamber asks this Court to declare invalid provisions that introduce midstream and retrospective changes as to how compliance with empowerment targets is calculated and enforced. The respondents' response defines the fourth dispute as follows:

2.3.1 In relation to the new calculation provisions, the respondents claim in paragraph 148 to 157 that the 2010 Charter was amended in exercise of the Minister's powers to develop the Original Charter, that these changes were rational, and that they were not retrospective.

2.3.2 In relation to the retrospective introduction of penalty provisions, it is the response of the respondents in paragraphs 158 to 161 that these provisions flow directly from the provisions of the MPRDA and that the Charter contravention becomes an MPRDA contravention where the charter targets constitute one of the conditions of the granting of the right.

3 **The structure of this affidavit**

3.1 Much of the respondents' affidavit is devoted to legal argument. I deal below with the material contentions advanced by them. Their contentions will however be dealt with in full during the hearing of this matter and accordingly where such contentions are inconsistent with the Chamber's submissions they should be taken to be denied. I have also dealt with the central disputes of fact (limited though they are) which appear from the

respondents' affidavit. Again, where they are inconsistent with the facts set out in this affidavit and the Chamber's founding affidavit, they should be taken to be denied.

3.2 In this affidavit, I deal with the respondents' affidavit in five parts:

3.2.1 In the first part, I locate the application within the case the Chamber has actually made out in the founding affidavit. The respondents have fundamentally mischaracterised the Chamber's case, by attempting to link it to an apparent reliance on the expression "*once empowered, always empowered*" ("***once empowered* expression**"). This is not the Chamber's case. I deal with the Chamber's true case and the nature of this misdirection.

3.2.2 In the second part, I deal with the respondents' case on the interpretation of the obligations and powers contained in the Charter and the MPRDA. I point to a fault-line in the case of the respondents relating to the absence of a legal authority for the powers it seeks to exercise.

3.2.3 In the third part, I deal with the respondents' case on the retrospective, midstream changes in the requirements for compliance, and the methods of enforcement introduced by way of the 2010 Charter.

3.2.4 In the fourth part, I respond to the respondents' contentions regarding the economics of a perpetual, recurring empowerment obligation enforceable through the licensing provisions.

3.3 In the fifth part, I respond to the specific allegations made in the answering affidavit on a paragraph-by-paragraph basis.

4 Individual company examples

4.1 The parties agreed to the approach to this court to resolve the interpretative dispute between them. The respondents have, however, in their answer launched a particular attack on individual members of the Chamber and questioned their empowerment compliance. Those individual cases and their merits are not the focus of this application, nor does an examination of their detail assist in the resolution of the interpretational disputes which arise in this matter. Since, however, the respondents' understanding of the transactions in question is deeply flawed, I have referred to and attached affidavits from the relevant companies in response to the respondents' attack.

4.2 The respondents undertook to engage individually with companies if it took the view that they had not complied with empowerment targets. It was accordingly inappropriate to air complaints about individual transactions in the respondents' answering affidavit.

PART ONE: THE CHAMBER'S CASE

5 The respondents' response to the Chamber's case is to mischaracterise it as a case founded on the "*once empowered*" principle. I describe this mischaracterisation below. By doing so they attempt to shift the focus of the enquiry to whether or not this "*principle*" can be upheld, or be justified, in the light of the legislative context.

6 But this is not the Chamber's case, and is not the question which the Court is called upon to answer. The Chamber's case is based on the fact that the legislative provisions and the Original Charter provide for specific and circumscribed empowerment obligations based on agreed parameters, and that its members have complied with those obligations. Since then, the Minister's aspirations have shifted, and he now seeks to give retrospective effect to them through the 2010 Charter and provisions that were never intended for this purpose. As I have pointed out in the Chamber's founding affidavit, the Chamber contends that the 2010 Charter was, unlike the Original Charter, not the product of an agreement between the various stakeholders and (assuming, but not accepting, that the Minister was empowered to publish it) sets out guidelines and not enforceable requirements.

7 The Chamber's starting point is the proper ambit of the relevant legislative provisions. The Chamber seeks clarity on what obligations are imposed on its members by law, and what powers those laws grant the Minister and his functionaries. It is interested only in obtaining a

definitive pronouncement from the Court on the relevant provisions of the MPRDA and the Charters, so that there can be legal certainty regarding the Minister's powers to enforce those obligations. It seeks a declarator that the empowerment provisions be used for the purpose for which they were intended, and that its members' obligations must be limited to those that were authorised by Parliament.

8 At the heart of the Chamber's case is the simple proposition that the empowerment obligations of its members and the powers of the Minister cannot be sourced from outside the relevant legislation. This proposition has an important constitutional underpinning, since it concerns the principle that the Minister's functionaries must act exclusively within the powers conferred upon them by the legislature and cannot by fiat create their own powers. It is crucial that a clear distinction be drawn between the legal powers of the Minister and his functionaries on the one hand and the extra-legal objects of the Minister on the other. It is for that reason that this court pronounce not only upon the proper interpretation of the relevant legislation, but also upon the meaning, status and effect of those of the provisions of the 2010 Charter relevant to this application.

9 The provisions regulating the conversion and granting of mining rights were never intended to serve a perpetual, recurring empowerment purpose, and are not crafted to achieve such a purpose -- however laudable such a purpose might be. The Minister cannot distort the provisions of the legislation relating to the allocation of mining rights to

achieve a new, broader purpose. Whatever the shift in the Minister's aspirations in this regard, the limitations of those statutory provisions remain.

10 **Mischaracterising the Chamber's case**

10.1 The respondents create the impression in paragraphs 24 and 78 that the Chamber's case is based on "*applying*" the *once empowered* expression, or using it as a "*disguised*" *"interpretative tool*". They say in paragraph 76 that the Chamber contends that the MPRDA, and the 2010 Charter and scorecard "*must include this concept*", and in paragraph 78.18 that the Chamber attempts to "*read into the 2010 Charter*" the *once empowered* expression.

10.2 This is a mischaracterisation of the Chamber's case, and a distraction from the real argument the Chamber makes.

10.2.1 The Chamber does not seek to apply this expression, disguise it, or use it as a tool, include it as a concept in the Charters, or read it into the 2010 Charter. In short, the Chamber seeks certainty on the applicable law so that it may be fairly and consistently applied. It does not, and could not, request this Court to interpret an expression which has served as a shorthand description of a legislative outcome.

10.2.2 The *once empowered* expression is merely a description of the impact that granting of a mining right has on the holder's

empowerment status as contemplated in section 23(1)(h) and Item 7(2)(k) in Schedule II of the MPRDA. I explain this in paragraphs 1.7 and 4.2 to 4.10 of my founding affidavit. The respondents claim in paragraph 24 that the *once empowered* phrase is interchangeably referred to as the "*continuing consequences*" principle. The Chamber does not consider it to have interchangeable meanings; they mean different things. I pertinently distinguish the two principles in paragraph 4.3 of my founding affidavit.

10.2.3 The *once empowered* expression is commonly used; often inaccurately. The respondents' own interpretation appears to be that it is a broad principle that permits the preservation of the consequences of having achieved empowerment status beyond what the legislation permits.

10.2.4 Defining it more accurately, however, serves no purpose in the present instance. The Chamber does not seek to make out a case based on the *once empowered* expression, and its claim is quite the opposite from the one the respondents suggest. The question is what the legislation permits, regardless of the breadth or scope of the expression in the common parlance.

10.2.5 The respondents in paragraph 78.1 and 78.7 raise the spectre of a mining industry owned only by non-HDSAs if the *once empowered* expression is recognised as a "*valid*"

"*interpretation tool*". It says in paragraph 78.16 that as a "*tool*" it holds the risk of "*reinstating the systemic marginalisation of the majority of South Africans*". The respondents say that the "*concept*" should for this reason be declared inconsistent with the MPRDA. Again, the Chamber does not contend for, or rely on, such an "*interpretative tool*". In any event, it is not understood how a "*concept*" – and moreover one that the Chamber does not rely on – can be declared inconsistent with the MPRDA.

10.2.6 In any event, to posture that 0% HDSA ownership is a likely outcome of the current disagreement between the parties is entirely at odds with reality. Moreover, the warning that the systemic marginalisation of black South Africans will follow if the empowerment obligations in the MPRDA are not framed in the manner they suggest, is unjustifiable on the facts and is as hyperbolic as it is groundless. If these were legitimate or reasonable respondents' concerns, the legislation would have provided safeguards against them. The legislation is silent on this. The complete answer to the respondents' concerns is that if, on a proper interpretation of the relevant empowerment provisions, they do not mean what the respondents thought they meant, or do not achieve the respondents' current objectives, the proper response is to introduce legislation which does.

10.2.7 Indeed, the reality is that far greater and more immediate economic risks are introduced by the respondents' attempt, in midstream, to change the way in which they seek to achieve their empowerment aspirations. I deal with these in greater detail below.

PART 2: THE RESPONDENTS' (ABSENT) CASE ON INTEPRETATION

11 The fault-line in the respondents' case: the absence of legal authority

11.1 Once the mischaracterisation of the Chamber's case is revealed, it shows the fault-line in the respondents' case. It is that the respondents do not show, and cannot show, the legislative basis for their own contentions. That is presumably why they focus on attacking a catch-phrase on which the Chamber does not rely, rather than interpreting the relevant legislation.

11.2 The respondents contend for a perpetual, recurring obligation on holders of rights to maintain their empowerment ownership level at 26% that is enforceable through the licensing provisions. In order to do so they must identify the binding provisions which contain such an obligation, and such a concomitant power. They have not done so because there are no such provisions.

11.3 The respondents deal in their affidavit with the Constitutional purpose of *the MPRDA and the policy background to the MPRDA* (in paragraphs 6 to 13). Thereafter, they consider the following provisions of the MPRDA:

11.3.1 The preamble of the MPRDA (paragraphs 14 to 15)

11.3.2 The objects of the MPDRDA in section 2 (paragraphs 16 to 21)

11.3.3 The interpretation provisions in section 4 (paragraphs 22 to 24)

11.3.4 The granting by the Minister of prospecting rights in section 17 (paragraphs 26 to 28)

11.3.5 The granting by the Minister of a mining right (paragraphs 29 to 34)

11.3.6 The reporting provisions in sections 25(2)(h) and 28(2)(c) (paragraphs 35 to 37)

11.3.7 The power to cancel or suspend a right in section 47 (paragraphs 38 to 39)

11.3.8 The development by the Minister of a Charter in section 100 (paragraphs 40 to 42)

11.4 Not one of these provisions says that the Charter obligations are binding, what the content of the Charter obligations are, how Charter obligations

are to be interpreted, or that non-compliance with a Charter obligation can be met by suspension or cancellation of a mining right. In particular, there is no suggestion of a perpetual and recurring obligation on mining right holders to maintain a 26% HDSA ownership obligation that is enforceable through the licensing provisions. Indeed, interpreting all these provisions of the MPRDA together produces the opposite result from the one suggested by the respondents.

11.5 The respondents' affidavit also does not point to any provision that permits, should a 26% HDSA ownership level not be maintained, the suspension or revocation of a company's mining right, or the imposition of the criminal sanctions they threaten. This absence in the argument advanced by the respondents is important, since it highlights one of the Chamber's central concerns, namely that in their attempts to achieve their empowerment objectives the Minister and his functionaries have sought to exercise powers which they do not have. I am advised that it is trite law that a functionary may exercise only those powers which are conferred by enabling legislation. It is to establish definitively what empowerment obligations are imposed by law upon the Chamber's members and to curtail the employment by the Minister's functionaries of extra-legal powers that the Chamber has turned to the courts.

11.6 At best, the respondents' attempts to point to provisions supportive of their case are linked to their misconceived attack on the *once empowered* principle. They say in paragraphs 37 and 78.12, for

example, that the reporting provisions in the Charter, and in sections 25(2)(h) and 28(2)(c) of the MPRDA, negate the "*once empowered principle*". The correct question to be asked, however, is whether the requirement of annual reporting imposes any duty on mining right holders in relation to empowerment other than those contained in in section 23(1)(h) and Item 7(2)(k) in Schedule II of the MPRDA. It is clear that it does not.

12 **What is to be interpreted?**

12.1 This fault-line in the respondents' case is most clearly illustrated in the relief sought by them – or more accurately, their response to the relief sought by the Chamber. Despite agreeing with the Chamber to approach the court for a definitive interpretation to resolve the dispute between the parties, the respondents nowhere explain which legislative provisions they seek to interpret and how those provisions should be interpreted. Instead, in the final paragraph of their answer, they ask merely that the Chamber's application be dismissed.

12.2 The respondents identify no provision that stands to be interpreted in a manner that will support their contentions that there is perpetual, recurring obligation to maintain the 26% HDSA ownership provisions enforceable through the licensing provisions, that the Minister and his functionaries have the power to compel compliance, or that the ownership targets can be calculated based on the 2010 Charter provisions. Section 4 of the MPRDA applies to interpretation of a

provision of the MPRDA. No provision has been adduced by the respondents as falling to be interpreted. Therefore section 4 finds no application.

13 **An equality commitment – but how and when?**

13.1 It is undisputed that the MPRDA gives effect to the Constitutional commitment to ensure equitable access to mineral resources and to redress past discrimination.

13.2 But this is neither the only purpose of the Act, nor is the MPRDA the only legislative measure that deals with this purpose.

13.3 Mining companies - like any other business enterprise operating in South Africa – are bound by the full breadth of equality legislation: the Constitution, the Promotion of Equality and the Prevention of Discrimination Act, the Employment Equity Act, the Broad-Based Economic Empowerment Act, the Preferential Procurement Act, and any other legislation that aims to achieve equality, that eradicates discrimination, and that promotes opportunities for previously disadvantaged individuals. All these Acts encompass the framework established by Parliament to achieve this purpose. They operate in different ways – employing prohibitions, criminal sanctions, quotas, incentives, targets and other measures to achieve their transformational objectives.

13.4 I mention the broader statutory context because in paragraph 41, sweeping statements are made that the government will not be able to achieve its "*objectives of redressing historical, social and economic inequalities*" if the Charters are not held to be enforceable in the way the respondents suggest.

13.5 This is plainly wrong. The objectives relevant to this case are those given effect to in this legislation. The measures employed in this legislation, have been given effect to. The Chamber and its members have partnered with government in order to achieve those objectives and to comply with the measures.

13.6 The broader, more aspirational challenge of achieving even greater social equality remains. As laudable as these broader purposes are, the Minister may not simply incorporate those midway and retrospectively, and without legislative authority to do so.

13.7 The legislature, while stating its equality commitment broadly in the MPRDA, included three specific mechanisms to achieve that commitment -- developing a Charter, making it a requirement for the Minister to consider whether the granting of a right would advance the aims of the Act, and reporting on Charter compliance. Each mechanism has a defined ambit and must be applied within or over a particular timeframe. None of them supports the respondents' contention of a perpetual, recurring ownership requirement.

14 **The timing is clear**

14.1 The following aspects are relevant in regard to the abovementioned three specific mechanisms.

14.1.1 As to the requirement of developing a Charter, the Minister was empowered by section 100 to develop the Charter "*within six months*". The purpose was to set "*the framework for targets*" and the "*timetable*" for effecting the entry into and active participation of historically disadvantaged South Africans into the mining industry. The Original Charter also had to allow such South Africans to "benefit from the exploitation of the mining and mineral resources and the beneficiation of such mineral resources."

14.1.2 It also required of the Minister in section 23 and in item 7(3) of Schedule II, *when granting or converting mining rights* to consider, among other things, whether the granting or conversion would advance the section 2(d) aim and be in accordance with the Charter.

14.1.3 Finally it provided for *annual reporting* on, among other things, Charter commitments in sections 25 and 28.

14.2 Reading these three provisions together emphasises the fact that they are each clear about the point at which, or timeframe within which, they operated: the Charter *within six months* (although it in turn would set out

a timetable for entry of HDSAs into the mining industry), the licensing provisions *on granting or converting* the right, and the reporting, annually – and implicitly within the timeframe that the Charter itself would establish.

14.3 No amount of interpretation – either contextually or textually – can suggest a perpetual and recurring obligation arising out of these provisions. Even if the Charter timeframe (to be established in terms of section 100) were to introduce certain perpetual or recurring obligations, the Minister is not given the power in the licensing provisions in section 23 and item 7(2)(k) of the transitional provisions to assess on a recurring basis whether Charter targets are met, or what the consequences would be of a failure to meet them.

15 **One purpose among many**

15.1 Each of these three mechanisms in the MPRDA also refers to the achievement of more than one purpose:

15.1.1 The Charter must in terms of section 100(2)(b) set out "amongst others how the objects referred to in section 2 (c), (d), (e), (f) and (i) can be achieved."

15.1.2 Upon granting the right in terms of section 23 the Minister must consider a range of issues: optimal mining of the mineral in terms of the mining work programme, access to financial resources and technical ability, the financing plan being

compatible with the intended mining operation and the duration thereof, the environmental impact, a social and labour plan, health and safety, and no existing contravention. One of the issues is whether granting such right will further the objects referred to in section 2(d) and (f) and in accordance with the charter contemplated in section 100 and the prescribed social and labour plan.

15.1.3 The annual report required in sections 25(2)(h) and 28(2)(c) must detail the extent of the holder's compliance with the provisions of section 2 (d) and (f), the Charter and the social and labour plan.

15.2 It is accordingly difficult to understand how these mechanisms -- either individually or collectively – can be interpreted to impose a perpetual and recurring obligation regarding ownership requirements specifically and exclusively.

15.3 This is not merely an interpretative concern. A perpetual and recurring ownership requirement and one that is perpetually reassessed by the Minister on a recurring basis has the capacity to impact negatively on other objects of the Act, including the promotion of economic growth and mineral resources development in South Africa, the promotion of employment and advancement of the economic welfare of all South Africans, and provision of security of tenure in respect of mining operations.

 S.G

15.4 Even the section 2(d) objective of providing opportunities to enter the industry, on the one hand, and the objective to provide benefit from the exploitation of minerals have competing implications for the respondents' contention. While a perpetual and recurring ownership obligation may well increase greater entry into the industry, it significantly reduces the benefit given to HDSA entrants as explained in greater detail below.

15.5 The respondents do not explain how these competing considerations must be understood, or why they support their contention of a perpetual, recurring, enforceable ownership obligation.

16 **The reporting obligations do not support the existence of an ownership maintenance obligation**

It is difficult to appreciate how the reporting requirements of sections 25(2)(h) and 28(2)(c) of the MPRDA could justify the reading into either section 25 or 28 an obligation on the part of the holder of a mining right to "top-up" its HDSA ownership percentage when it falls below 26%, failing which its right may be suspended or cancelled. Had the legislature intended to create such an obligation, it would no doubt have made provision for cases in which the diminution in percentage HDSA ownership was caused by circumstances beyond the control of the mining right holder, or could not be remedied by it. But it has not. The inescapable inference is that no such obligation was intended.

17 **The explanation of the calculation change**

17.1 The respondents' response to the Minister's departure from the requirements in the Original Charter in the 2010 Charter is curious.

17.2 In the first instance, the respondents say in paragraphs 167 to 169 that the Chamber and its members have misunderstood the introduction in 2010 of the words "*prior to the promulgation of the Mineral and Petroleum Resources Development Act, 28 of 2002*" in the 2010 Charter. They say that these words did not change the meaning of the Original Charter in paragraph 4.7 where it declares that "*the continuing consequences of all previous deals would be included in calculating such credits/ offsets in terms of market share as measured by attributable units of production*".

17.3 The respondents say in paragraph 168 that the introduction of the words "*prior to the promulgation of the Mineral and Petroleum Resources Development Act, 28 of 2002*" made no difference and therefore did not require agreement, despite the fact that the provision now reads:

> "*The continuing consequences of all previous deals concluded prior to the promulgation of the Mineral and Petroleum Resources Development Act, 28 of 2002 would be included in calculating such credits/ offsets in terms of market share as measured by attributable units of production.*"

17.4 The respondents say that, in particular, this did not mean that deals concluded subsequent to the conclusion of the Original Charter would be

excluded from consideration. They say that, in any event, no one was deprived the credits and offsets for such deals.

17.5 It is hard to see how the respondents' contention can be accepted. The language clearly changed. The respondents' lack of concern with the disjuncture between the clear meaning of the text and the manner in which they have implemented the provisions underscores the need for a declarator on the proper interpretation of the provisions, read with the other relief sought by the Chamber in relation to the Charters. The principle of legality, which lies at the heart of our Constitutional dispensation, requires that government functionaries act in accordance with law. The respondents' response is that whatever the 2010 Charter may have said, and despite the fact that they regard its provisions as having the force of law, the fact that the Minister's functionaries did not give effect to it means that the Chamber's concerns are not warranted. That neatly demonstrates the Chamber's concerns, namely that there is a serious dissonance between what the law says and what the Minister and his functionaries do.

PART THREE: THE CASE ON CHANGING THE CHARTER REQUIREMENTS

18 The respondents' argument is, in essence, that the Minister was entitled to develop the Original Charter and that that power is limited only by section 6 of the MPRDA. That argument necessarily involves a concession however that in the exercise of that power the Minister must act fairly and may not retrospectively change the requirements which

applied when holders of mining rights entered into transactions (at great cost) which complied with the Original Charter and which enabled such holders to satisfy the 26% HDSA ownership requirement and on the basis of which such mining rights were granted or converted.

19 The respondents' answer to the Chamber's complaint that the Minister unfairly "*changed the goal posts*" when promulgating the 2010 Charter is to deny firstly that there was any material change, which is simply unsustainable on the plain language of the 2010 Charter, and to insist that whatever the 2010 Charter might say, the Minister and his functionaries do not apply the 2010 Charter in accordance with its terms. Both responses are legally untenable.

PART FOUR: THE UNDERLYING ECONOMICS OF THE EMPOWERMENT PROVISIONS

20 In paragraph 97 the respondents respond to the Chamber's contentions presented in paragraph 4.9 of the founding affidavit regarding the impact of the midstream introduction of on-going empowerment obligations on investment value of mining companies.

21 It is essentially the respondents' argument that a continuous 26% empowerment obligation ought not to have resulted in the dilution of the HDSA ownership of mining companies at any point. Principally they say, in paragraph 97.1, that this is the case because mining companies could have locked in HDSA shareholders by commercial ring-fencing and by insisting that the shares be sold to another HDSA.

22 **Ring-fencing and lock-in provisions cannot be imposed retrospectively**

22.1 It may well be that a possible response to a requirement of a perpetual, recurring 26% ownership requirement would have been to introduce ring-fencing and lock-in provisions. If such a requirement had existed at the time that the members acquired their mining rights by grant or by conversion, they may have protected the value of their assets by introducing such measures.

22.2 It is clear on the evidence, however, that on any version of the facts, no perpetual recurring requirement existed. The Charters clearly contemplate no such on-going obligation. The suggestion of a continuous, on-going 26% empowerment obligation is made as a result of a midway shift in the Minister's empowerment aspirations. Even on the respondents' approach they must accept that the measures they suggest that the industry ought to have taken against the risk of dilution could not have been available to companies who were not aware of this unilateral policy change.

22.3 The risk of dilution arises only now, as the Minister attempts to shift the goalposts. It is this fundamentally inequitable result, and the devastating economic consequences that follow, which the Chamber asks this court to consider in declaring what the proper meaning and ambit of those obligations are.

23 **The respondents signed off on such arrangements that were made**

23.1 Moreover, and because the Original Charter was based on a negotiated position and accordingly a common understanding between the respondents and industry, the respondents granted and converted rights well-knowing that the obligation was not a continuous and on-going one. The only exception to this is where, in terms of sections 11(1) and (2), a prospective cessionary of a right again has, in its own capacity, to demonstrate that it satisfies the requirements contemplated in section 23, including therefore section 23(1)(h).

23.2 Mining companies submitted empowerment structures and mining work programmes to the respondents as part of the mining right grant or conversion process.

23.3 When the respondents approved applications for grant or conversion from mining rights holders, they accordingly knew very well that mining companies did not have, and would not have had, an expectation of the continuous 26% requirement for which the respondents now contend.

23.4 There would accordingly have been no awareness of the necessity for the elaborate lock-in arrangements and closed market trading structures for which the respondents contend, and the respondents would have known this.

23.5 There were no regulations or rules pertaining to the lock-in principle. Guidance received from the DMR has been inconsistent across the

industry, with some companies being guided to temporary lock-ins, while others were asked to remove lock-in clauses. This has been a function of changing Directors-General and other senior officials of the DMR and part of the varying exercise of discretion of the different DMR officials involved in the mining right grant or conversion process. The result would at best be an arbitrary and irrational distinction as between the companies who were advised and assisted in regard to measures to protect themselves against the new risk introduced by respondents, and those who were advised against those measures.

23.6 But even the respondents' suggestions of how mining right holders should have satisfied the requirement for a perpetual 26% HDSA ownership requirement would not have been sufficient. I do not understand the respondents to suggest that the Minister or his functionaries have ever requested, let alone required, perpetual lock-in clauses. Where such clauses have been inserted into shareholders' agreements, they have generally been for a fixed term. Such clauses do not solve the problem created by the Minister's new empowerment paradigm; they simply postpone the problem.

24 Substantial and meaningful benefits

24.1 The departure point of the respondents' contention is a perpetual and recurring obligation to maintain ownership targets enforceable through the provisions in the MPRDA regulating the granting or conversion of the right. As a high-watermark of this contention, the respondents make an

interpretative nod in the direction of the objects of the MPRDA and the purpose and genesis of the Charters. But, as I mention above, these objects do not support a recurring ownership obligation, and certainly not by way of the operation of the licensing provisions.

24.2 The Minister must, at the point of granting or converting mining rights, assess whether the transformational objects of the Act and the purposes of the Charters will be furthered. As a matter of interpretation, in doing so, the Minister must not only facilitate *entry* into the industry, but must also ensure that the HDSA entrants receive a substantial and meaningful *benefit*. This requirement must be interpreted to mean – at the very least – that the ownership must be valuable in the hands of the HDSA entrant.

24.3 When considering ownership from the point of view of the HDSA entrant – as one must to assess its value – it is clear that the respondents' approach to a perpetual and recurring ownership requirement will reduce the value of the HDSA share, and through it the benefit that accrues to the HDSA entrant. This is so for the reasons that follow.

25 **The changing value of a mining operation over time**

25.1 The respondents say in paragraph 97.2 that it is not unfair to hold an HDSA shareholder to its ownership status "*for a particular timeline*". They say that such a timeline does not need to disadvantage the HDSA owner -- there is, they say, no "*obligation*" for an HDSA "*to dis-invest when market conditions are not conducive*". But this is not the point. HDSA shareholders, like all shareholders, will wish to exit their investments

when market conditions are to their advantage. Assuming that this is so, the question is which HDSA shareholder will wish to take their place?

25.2 The respondents' entire conception of a perpetual HDSA shareholder "top-up" is blind to the fact that such shareholding may or may not be beneficial, depending on the timing of the transaction.

25.3 In particular, it does not take into account the fact that the mining right in question is awarded for a fixed period, and that it relates to a particular mining operation over the life of a mine. The value of the mining operation is not static over the period of that right, or over the life of a mine.

25.4 From the mining right holder's point of view, the value of the operation is related to both the period for which the right is granted and the life of the mine. Those considerations are all included in its application for grant or conversion of a mining right. These considerations are reflected in the mining work programme included in the application. This mining work programme must in terms of MPRDA Regulation 11 include, among other things, the costing of regulatory requirements in terms of the Act over time. When the Minister grants the right, or converts it, he does so on the basis of this work programme. Assessing at this point the value of the business, factoring into it the value of, and benefit to, HDSA partners, and requiring that HDSA shareholders own a fixed percentage share of that value is rational. Attempting to do so on an on-going basis is irrational.

25.5 The value of the mining operation changes over the life of the mine – indeed, by the end of the life of the mine, what remains are mostly obligations, in particular those relating to environmental rehabilitation. How the value of the mining operation that forms the subject of the right affects the value of shares in the mining right holder depends on a variety of factors, including the extent and number of mining ventures owned by the holder of the right.

25.6 Even this high-level analysis shows that there is a disjuncture between the value of the licensed operation, and the value of ownership in the holder of the right. This makes it irrational to link enforcement of ownership requirements to the licensing of the mining operation.

25.7 Postulating a mining rights holder with only one mining right over one mining operation, it is clear that it will become impossible, or at least commercially non-viable, for the mining company to achieve again and again its 26% ownership requirement in the mining right holder as HDSA shareholders exit and the end of the life of mine approaches.

25.8 The respondents say in paragraph 97.3 that it is not true that the on-selling to HDSA shareholders will erode the equity. This is, the respondents says in paragraph 97.3, because the HDSA shareholder can simply sell to another HDSA shareholder, which will not "*threaten*" the "*transformation credentials*" of the mining right holder.

25.9 This response is glib. HDSA buyers will have to be found. In particular, an HDSA buyer will have to be found who is willing to buy into the

business without regard to the stage, or economic state, of the business operation. The respondents postulate not just that such an HDSA owner exists, but that he or she would be willing to buy precisely at a time that those shares would be unattractive to any other buyer on the open market. The current depressed market for minerals such as platinum, iron ore, and coal, demonstrates this. This cannot be the kind of "empowerment" that the MPRDA intended.

26 **Realising added value for HDSA shareholders**

26.1 The respondents say in paragraph 97.4 that it is not true that their contention would require a continuous conclusion of HDSA transactions. Instead, it is contended that if each HDSA simply sells to another HDSA, no empowerment transaction will be necessary and there would be no risk in dilution. This does not address the fundamental problem in the respondents' approach. In particular, it does nothing to ensure that HDSAs who purchase HDSA shares obtain anything of value in the course of such an "on-sale" of shares from one HDSA shareholder to another.

26.2 The value of an HDSA ownership share is fundamentally linked to the manner in which empowerment transactions are structured and financed. It is only in the course of such transactions, when application is made for the right or for conversion of the right – that shares can be issued to HDSA shareholders at a cost below their market value. This "added value" is produced both through financing mechanisms which effectively

subsidise the cost of borrowing the funds necessary to finance the empowerment transaction, and the value at which the shares are issued.

26.3 After the initial transaction, and once the share transactions are subject only to market forces, there is little or no additional value that can be added to the value of the shares. The respondents' argument makes no provision for the economics of the share value of a listed company.

26.4 Since HDSA shares acquired after the initial BEE transactions are acquired at market value (which will take into account the fact that the disposal of the shares is restricted), with no added value accruing to the new HDSA shareholder, there is simply no incentive for the new HDSA to purchase the shares on offer.

26.5 Fundamentally, the value for an HDSA shareholder realises only at the point of exit. In particular – in the context of value being added to those shares through financing arrangements and in the course of the BEE transactions – the particular value for an HDSA shareholder lies in realising the difference between the added value allocated to the share, and the market value at the time of exit.

26.6 Importantly, the respondents' contentions overlook entirely the fact that listed shares cannot generally be encumbered in the manner suggested by the respondents, and that the racial identity of the shareholder is not ascertainable by the listed company.

26.7 One of the goals of the Original Charter was "*the pursuit of a shared vision of a globally competitive mining industry*". The Preamble to the Original Charter furthermore recorded that the key objectives of the MPRDA and the Charter would be realised only when "*South Africa's mining industry succeeds in the international market place where it must seek a large part of its investment*". One of the obvious consequences of the respondents' insistence that the holder of a mining right must continually preserve its 26% HDSA shareholding is that that 26% investment will for evermore be unavailable to foreign investors and, ironically, that HDSA shareholders will be precluded from selling to their most obvious market.

27 **Adding value through funding facilitation**

27.1 The Mining Charter calls for facilitation by the selling company (i.e. the company selling its shares, or the shares of its subsidiary, to an HDSA) of funding for the HDSA shareholder, which has occurred in most transactions. This funding facilitation, together with the trickle dividend, results in asymmetric value transfer to the HDSA shareholder:

27.1.1 Very rare circumstances exist where stakes were independently financed without some form of funding facilitation from the mining company implementing a transaction that would facilitate the introduction of HDSA shareholders. This facilitation resulted in the selling companies carrying the full cost of capital associated with an asset, albeit

that they only benefited from a reduced portion of the return, i.e. they carried 100% of capital cost, for 74% of the return.

27.1.2 Furthermore, the selling company generally provided all capital investment costs required to develop the mines with minimal cash/capital injections from the HDSA shareholder given the HDSA shareholder's inability to raise its proportionate capital contribution to project development.

27.1.3 In addition, the HDSA shareholder bears a greater return on the investment due it having an implied zero cost option, i.e. the HDSA receives all the upside benefit with limited or no capital at risk, shares in the upside in relation to asset performance, but does not share in the downside risk. By virtue of the funding facilitation, the downside risk is reduced should value reduce below the purchase price. The HDSA shareholder will in that case have the option of exiting the transaction at no cost or having the selling company revise the funding facilitation structure. In addition, in some transactions, the selling company stands in for the HDSA shareholder to the extent that external debt covenants have been breached.

27.1.4 No regulations or rules require a restricted HDSA stakeholder market. The examples given by the respondents of specific mining companies with such arrangements have resulted in the restricted HDSA shareholders having experienced

significant challenges as tradability of those HDSA shares remains an issue, i.e. liquidity has been very poor in those exchanges.

28 **The role of dividends**

28.1 In the spirit of the Mining Charter and due to the long-term nature of the mining industry investment cycle, selling companies implemented trickle dividends to HDSA stakeholders. These dividends were not equally paid to non-HDSA stakeholders. In most cases, the non-HDSA shareholder was required to contribute further capital for the sustainability of the asset, while the HDSA shareholders continued to receive the trickle dividend.

28.2 The suggestion that a dividend, trickle or otherwise, equates to economic value is fundamentally flawed. Trickle dividends are disproportionately small in relation to the value gain in relation to an asset sale.

28.3 Value creation, or return to a shareholder, is a function of both capital return on an asset as well as dividends. In fact, financial theory indicates that for growth assets, it is likely that zero or a very low dividend will be paid because of the need of the company to preserve its capital to fund growth from internally generated cash flows. This is because the growth is generally realised over a longer period, requiring cash flows to be allocated to capital investment.

28.4 A shareholder in a growth asset realises the majority of its returns from capital appreciation and not from dividends. The mining industry has been seen as a growth sector which pays proportionately lower dividends.

28.5 The Kumba example cited in the answering affidavit is an exceptional case. The iron ore price rose to unprecedented highs in the period for which the Envision I scheme endured, with consequent high dividends and share price growth for Kumba. This resulted in significant payouts for the beneficiaries of the scheme. The period relevant to the second Kumba scheme, Envision II, has seen a dramatic fall in the iron ore price, and consequent reduction in Kumba's share price and dividend payouts. The Kumba share price has fallen from around R500 per share in 2011 to just over R80 per share in August 2015, and while it declared dividends of R34.50 per share in the financial year ending in February 2011 (the year in which Envision I concluded), it declared no interim dividend at all in August 2015. Given the potentially slow recovery in iron ore prices, and consequently, the Kumba share price, it is possible that Kumba might not be in a position to declare a dividend in the near future and this will impact negatively on Envision II, which is set to conclude in 2016.

28.6 Bank funding is generally based on the ability of the borrower to repay the funding and the value of available collateral. Funding terms typically include asset cover ratios (value of shares divided by the outstanding funding amount) that are monitored on an on-going basis. If cover ratios

are breached, funders have the right to sell shares in order to partially repay funding to restore the cover ratios. If the DMR were to insist on restricted equity trading among HDSA shareholders only, this would limit the ability to realise the underlying security together with the amount that would be realisable for the underlying security. Third party funders would therefore find it more difficult to provide funding for these transactions.

28.7 BEE transactions sometimes require substantial support from the selling company in the form of funding guarantees. Guarantees affect a company's balance sheet and funding capacity. This in turn affects its ability to raise the requisite capital for capital projects, particularly in a down cycle, hampering the selling company's growth prospects during an upturn in the market.

28.8 The respondents (in paragraph110) refer to "*double dipping*" and use Gold Fields Limited (**Gold Fields**) and Sibanye as an example thereof. The respondents' contentions in this regard demonstrate a misunderstanding of the true nature of the transactions in question. These allegations are dealt with by Taryn Harmse on behalf of Gold Fields and Bunongoe Hartley Dikgale on behalf of Sibanye. Taryn Harmse's affidavit is attached hereto marked "**RA1**" and Bunongoe Hartley Dikgale's affidavit is attacked hereto marked "**RA2**".

28.9 The respondents (in paragraph 111) then go further to refer to "triple dipping". As explained, in the affidavit of Bunongoe Hartley Dikgale deposed to on behalf of Sibanye, Sibanye would have been entitled to

claim empowerment credits arising from the Mvela/Gold Fields transaction. In addition, and separately from the Mvela/Gold Fields transaction, Rand Uranium, a subsidiary of Sibanye, concluded a separate empowerment transaction with Mvela in relation to the rights that are held by Rand Uranium. In other words, there are two separate transactions involving Sibanye and Mvela and the respondents have confused these transactions.

29 **The implications of discounts flowing from HDSA lock-in clauses**

29.1 The Charters indicate that the sale of assets would occur at fair market value, excluding the possibility of discounts. As indicated in the answering affidavit at paragraphs 97.9 and 97.10, this is a cost to existing shareholders. It is not however a justifiable cost in relation to the retention of the mining right.

29.2 In the absence of the lock-in measures suggested by the respondents, which clearly could only have been employed with prior knowledge of the continuous and on-going 26% requirement, HDSA participants would remain unable to sell a stake indefinitely. Even if restrictions on those sales due to lock-in clauses were imposed, an HDSA stake:

29.2.1 may never be monetised, therefore full value not realised;

29.2.2 has specific windows of opportunities to monetise, therefore absence of unrestricted optionality.

29.3 It is recognised that some value would flow from dividends. But dividends do not replace capital value accretion from the sale of assets/shareholding. To re-iterate, the locked-in HDSA stakes may in theory demonstrate the same value as non-HDSA stakes, however the practical reality is that the locked-in HDSA stakeholders do not have the same discretion to exercise their rights over that value as non-HDSA non-locked-in stakeholders.

29.4 There are real negative value implications of not being able to monetise ownership, when restriction on trade exists. Consider, for example, HDSA shares valued at R10 billion in 2010 and R1 billion in 2015. The value loss would result when the HDSA shareholder could not sell in 2010 but was forced to wait until 2015. The net value loss in this instance would be R9bn. This is particularly relevant in the mining industry, which is very cyclical and highly volatile. Investors in this market aim to buy low and sell high repeatedly and liquidity is a critical criterion for investment in the mining sector.

29.5 The majority of companies that have been involved in public offers to HDSA shareholders have been consumer goods and services companies with large brand recognition. The industries in which the companies operate have also not been as cyclical as the mining industry, particularly considering the key drivers of growth and profitability of these companies. It is therefore likely to be more difficult to raise public offer funds for the trading of BEE securities in the mining industry. Public offer

transactions that have been successful have been based on some of South Africa's leading and most recognised brands such as MTN, Vodacom, Sasol, Nedbank, Multichoice (DSTV) etc. The circumstances which rendered those transactions feasible simply do not exist in the mining industry.

29.6 The amount of capital available to HDSA shareholders is limited. Restricted trading in such shares will inevitably result in their being traded at a discount. In addition, over time this may create division within capital markets, impermissibly and unconstitutionally divided on the basis of race.

30 **The respondents' vision of encumbered HDSA shares**

30.1 On the respondents' approach, not only must HDSA shares be traded from HDSA to HDSA at market value (in order to avoid dilution), but these shares must also be burdened with lock-in agreements and restrictions on their sale. These two considerations taken together make it questionable whether HDSA shareholders could be found to purchase HDSA shares when the original HDSA shareholders – presumably for sound financial reasons – exit from the deal.

30.2 The HDSA buyer that one must postulate for purposes of the respondents' argument is not only one who is willing to buy at no more than market value and subject to conditions that reduce the value of the shares in their hands, but also one who forsakes better options existing on the open market – in this industry or another – which would logically

be more attractive, in favour of the encumbered market value share bought from the initial HDSA shareholder.

30.3 In reality, this postulated willing HDSA buyer is likely to be rare. In fact, the restrictions which the respondents propose ought to be imposed on HDSA shareholders, would have the result that an HDSA stake may never be monetised, therefore preventing the full or indeed any value of those stakes being realised, or that the HDSA stakeholder has only specific windows of opportunities to monetise such stakes.

31 **The objectives achieved**

31.1 The mining industry has met the objectives set in the Charters, with significant value being transferred into the South African economy to the benefit of HDSA's.

31.2 There was not any clear or implied requirement that this value transfer should be confined to the mining sector.

31.3 The MPRDA together with the Mineral and Petroleum Resources Royalty Act, 2008 are the constitutionally permitted legislative measures which allow for use of the minerals in the ground as against payment of royalties as a resource rent for ensuring tenure of the usage of those minerals under the relevant mining right. The Mining Charter indicates nothing relating to a requirement to lock-in HDSA shareholders, as a requirement of on-going compliance in terms of the mining right.

PART 5: THE CHAMBER'S REPLY TO THE RESPONDENTS' INDIVIDUAL PARAGRAPHS

32 Having dealt with the main issues raised by the respondents in their answering affidavit I now turn to deal briefly *ad seriatim* with the relevant paragraphs of the answering affidavit. In doing so I do not intend to repeat what I have already said above, particularly in relation to the legal and economic arguments advanced by the respondents. As indicated above, those allegations made by the respondents, whether of law or fact, which are inconsistent with what I have set out in the Chamber's founding affidavit and above, should be taken to be denied.

33 Before turning to the particular paragraphs of the respondents' answering affidavit however, I wish to emphasise two important flaws in the approach adopted by the respondents.

33.1 The first flaw relates to what their case is on the meaning and effect of clause 2.1 of the 2010 Charter on the continuing consequences of empowerment transactions concluded *after* the coming into force of the MPRDA on 1 May 2004. It is entirely unclear from paragraph 102 of their answering affidavit whether they suggest that despite the wording of the final paragraph of clause 2.1 of the 2010 Charter, the limitation of continuing consequences to pre-MPRDA transactions applies *only* to transactions giving rise to credits or offsets derived from market share as measured by attributable units of production, or whether they suggest

that it is *only* the continuing consequences of those transactions which survive the limitation imposed by clause 2.1.

33.2 The second flaw in the respondents' approach is their argument that because an obligation to meet the objectives of sections 2(d) and (f) is "often" imposed as a term of a mining right granted in terms of section 23, and the term "this Act" is defined to include any term or condition of a licence right, the breach of that term constitutes a breach of the MPRDA. That argument faces several problems, not least of which is the fact that the standard licence term upon which the respondents rely, namely clause 17, does not in fact impose upon the right holder an obligation to meet the objects of sections 2(d) and (f). Instead it imposes an obligation on the part of the right holder to meet its obligations in terms of the empowerment agreement or arrangement it has entered into. Once the right holder has done so, it has complied with clause 17, which then ceases to operate.

34 **Ad paragraphs 1-5**

Save to deny that the contents of the affidavit are true and correct, the allegations contained in these paragraphs are noted.

35 **Ad paragraphs 6-75**

35.1 These paragraphs set out the respondents' legal contentions regarding the Constitution, the MPRDA, the Charters (including the scorecard) as well as certain ancillary documents such as the Mining Charter Impact

S.G.

Assessment Report of 2009 and the Stakeholders' Declaration of 2010. I have dealt with those arguments in the Chamber's founding affidavit and in the preceding paragraphs of this affidavit.

35.2 The Chamber disputes the respondents' interpretation of the MPRDA (read in the context of the Constitution) and the Charters. The Chamber also disputes the respondents' version of the circumstances under which the 2010 Charter was published, in particular the suggestion that the content of that Charter was a result of consultation between *inter alia* the Chamber, on the one hand, and the Minister and his functionaries on the other.

35.3 I point out that the principle of legality requires that where government functionaries seek to enforce compliance with policy objectives they must first translate those objectives into appropriate legislation. The policy objectives which the respondents seek to enforce through coercive measure have not been turned into legislation.

35.4 The respondents' reliance on section 4 of the MPRDA (in paragraphs 22-24) is unhelpful in the absence of a particular provision of that Act or the common law to which they seek to apply section 4.

35.5 The respondents make reference (in paragraphs 25-28 and 78.9) to, and submissions concerning, prospecting rights. Prospecting rights are not however the subject of this application. In particular, the Minister cannot "invariably" require an applicant for a prospecting right to give effect to empowerment objectives because section 17(1)(f) (which was inserted

with effect from 7 June 2013) refers only to prescribed minerals (where none have as yet been prescribed) and section 17(4) obliges the Minister to have regard to the type of mineral and the extent of the proposed prospecting project.

35.6 The respondents appear to believe that "meaningful economic participation" requires that transactions be concluded with entrepreneurs, workers *and* communities. That appears to be the explanation for the incorrect analysis of Aquarius' HDSA ownership percentage on which the respondents embark in paragraph 106. That definition does not, on a proper interpretation thereof, require that there be participation by all three of those categories of potential participants.

35.7 It is not clear for what purpose the respondents make reference to the "clarification note" in paragraphs 68 and 69. That note is irrelevant to the disputes with which this application is concerned and was in any event issued by an unknown person with no authority to issue it. The note has no legal effect or status.

35.8 It is incorrect to state, as the respondents do in paragraphs 72.4 and 72.5 that the grant of mining rights (not mineral rights as is suggested) is often made subject to a condition that transformation objectives are to be achieved. Clause 17, which the respondents cite as an example of such a condition, simply records that the holder of the right is bound to comply with the provisions of an identified empowerment agreement. Once that has been done, clause 17 ceases to operate.

36 **Ad paragraphs 76-89**

36.1 In these paragraphs the respondents set out their view of the *"once empowered always empowered"* concept. As we point out above, the Chamber did not in its founding affidavit seek to obtain an interpretation of that maxim. Instead, it set out its views on the proper interpretation of the MPRDA and the Charters on the basis of well-settled principles of interpretation.

36.2 Not only does the Chamber disagree with the respondents' views, it disagrees with the approach which they have adopted to the exercise which is required to assist the Court in order to determine whether or not the Chamber's members are obliged in law to continue to *"top-up"* the 26% HDSA ownership target after the grant of a mining right or conversion of an old order right.

36.3 In paragraph 78.14 the respondents refer to section 93(1)(b)(ii) of the MPRDA in support of their argument that the empowerment objectives of the MPRDA and the Charters are enforceable, on an on-going basis. However that section has nothing to do with the enforcement of empowerment objectives or requirements. Section 93(1)(b) concerns contraventions of the MPRDA which have occurred on, *inter alia*, the mining area. In other words, the section is concerned with the manner in which mining operations etc. have been or are being carried out.

37 **Ad paragraphs 90-93**

37.1 The respondents have in these paragraphs described in brief and fundamentally incorrect terms a series of transactions involving Gold Fields, Mvelaphanda Resources Ltd and Sibanye.

37.2 As I have pointed out above, the attack on Gold Fields, Mvelaphanda Resources and Sibanye mounted in these paragraphs is inconsistent with the agreement reached between the Minister and the Chamber in terms of which the Court would be approached to interpret those provisions of the MPRDA and the Charters which have given rise to the disputes between the Minister and his functionaries on the one hand and the Chamber and its members on the other. The examples quoted by the respondents are not only inaccurate, but fail in any way to contribute towards a proper resolution of the disputes which have been placed before the Court.

37.3 Despite the fact that the details of the transactions concerned are irrelevant to the proper resolution of the disputes which the court is required to resolve, I have been advised that it would be inadvisable not to respond briefly to the allegations made by the respondents. I accordingly attach hereto marked *"RA1" and "RA2 "* affidavits deposed to on behalf of Gold Fields and Sibanye which describe in brief terms the nature of the transactions to which the Director-General refers.

38 **Ad paragraphs 94-96**

38.1 The agreement in the Original Charter (not in the 2010 Charter) to review progress in 5 years' time did not imply an acceptance of the proposition that if a right holder which had met the 26% HDSA ownership threshold thereafter fell below that threshold it would be obliged to take steps to achieve that target by December 2014.

38.2 Given the views held by the Chamber and its members, such an agreement would be unthinkable, and would in any event fly in the face of the clear meaning of the MPRDA.

38.3 I agree that there is no *"tool of interpretation"* known as *"once empowered always empowered"*. The Chamber has not suggested that there is such a tool, nor has it purported to rely on such a tool. It is instead the respondents who have sought to interpret that phrase instead of identifying relevant provisions of the MPRDA. They have not done so because there are no such provisions.

39 **Ad paragraphs 97-97.15**

39.1 In these paragraphs the respondents attempt to put up a commercial argument in support of their contention that it would be *"reasonable and rational"* for shareholders who accept the cost of dilution represented by HDSA provisions to lock in HDSA shareholders *"for some period"* required to realise the HDSA benefits. It is also suggested that non-HDSA shareholders should accept the erosion of shareholder value as a fair exchange for the benefit of the mining licence granted to the mining company.

39.2 As I have explained earlier in this affidavit, and in the Chamber's founding affidavit, and apart from the fact that this is contrary to paragraph 4.12 of the Original Charter, the respondents' understanding of the realities of investment dynamics in general, and the particular environment in which mining companies operate, is mistaken. In particular, the return on investment obtained by an HDSA investor is not primarily through his or her share in the dividends, but through capital appreciation. The economic advantage obtained by an HDSA shareholder arises both from the fact that the shares are generally issued at a discount to market value and from the fact that the financing of the acquisition of such shares is provided at a discount to commercial rates. That advantage can only be realised upon exit, and the longer the exit is delayed, the less likely it is that the advantage will be maintained.

40 **Ad paragraph 97.16**

I have dealt with the Kumba experience above. It was dependent on the peculiar circumstances which prevailed at the time and could not be repeated now.

41 **Ad paragraphs 97.17-97.27**

I have dealt fully with these contentions above. I submit that they are untenable.

42 **Ad paragraphs 98-102**

I have dealt with the respondents' contentions concerning the 2010 Charter, and in particular the retrospective amendments which the 2010 Charter effected to the application of the "continuing consequences" principle above. The respondents have failed to address either the Chamber's submissions or indeed the wording of the 2010 Charter.

43 **Ad paragraph 103 -104**

43.1 The Chamber agrees that the examples cited here are examples of empowerment transactions which entitled and continue to entitle AngloGold Ashanti limited and Anglo Coal to benefit from the outcomes of those transactions. The examples cited reveal the commitment by members of the Chamber to the imperative of empowerment in that they were concluded even before the MPRDA made empowerment obligatory for the grant or conversion of mining rights. The Chamber accordingly agrees with the respondents in regard to the treatment of these examples for purposes of the Charters.

43.2 The Chamber points out, however, that those companies that may have concluded similar transactions after the MPRDA came into force should be treated in the same way.

44 **Ad paragraphs 105-106**

The Chamber has dealt with the legal obligations upon holders of mining rights to demonstrate compliance with HDSA ownership targets above. It does not accept the respondents' views in this regard.

45 **Ad paragraph 107**

45.1 As pointed out in a presentation on 13 March 2015 by Aquarius to the second respondent, in November 2006 Aquarius was empowered as to 26% which in April 2008 increased to 32,5%. The fact that this subsequently fell to something less demonstrates the very dispute between the applicant and the respondents. The respondents say that Aquarius had to remain at 26%, whereas the applicant contends that Aquarius did not have to do so.

45.2 The respondents' reference to Aquarius not showing that it has an empowerment structure which includes ESOPs and communities demonstrates another dispute between the applicant and the respondents in that the applicant contends that there is nothing obliging holders of mining rights to include ESOPs and communities among the HDSA beneficiaries.

46 **Ad paragraphs 108-111**

46.1 As I have stated above, the Minister and the Chamber agreed to approach this Court for a declaration on the proper interpretation of particular provisions of the MPRDA and the Charters. The examples

cited by the respondents are not only inaccurate, but also unhelpful to the Court.

46.2 The respondents' reference in paragraph 108 to section 108 of the MPRDA is misconceived. That section applies only to proceedings in terms of the MPRDA, which these are not.

46.3 In regard to the allegation in paragraph 11 of "triple-dipping" by Harmony, I refer to the affidavit by Frank Abbott of Harmony which is attached as "**RA3**".

47 **Ad paragraph 112-114**

These examples do not assist the respondents' argument, which is that the mining right holder must ensure that it remain 26% HDSA owned for the duration of its mining right. A 10-year lock-in clause would not meet the respondents' requirements, since it would expire long before the mining right would terminate.

48 **Ad paragraphs 115-278**

48.1 In these paragraphs the respondents take issue with the legal contentions advanced by me in the Chamber's founding affidavit. The Chamber persists in its contentions and to the extent that the respondents advance contrary contentions, they are disputed. I furthermore deny the respondents' factual allegations which seek to contradict the factual statements in the paragraphs in the Chamber's founding affidavit under reply.

48.2 It is apparent from what the respondents say in their answering affidavit that their understanding of certain core provisions of the MPRDA relating to the granting of mining rights is faulty. Thus in paragraph 117 the statement is made that the Minister may grant a mining right if he is satisfied with the manner in which the applicant *intends* to achieve the objects referred to in sections 2(d) and (f). But here the respondents confuse the requirements for the *granting* of a mining right and the requirements for the *conversion* of an old order right.

48.3 In the circumstances the Chamber persists in the relief sought in its notice of motion.

Ambrose Vusumuzi Richard Mabena

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at Sandton on the 9th day of September 2015, the regulations contained in Respondents Notice No R1268 of 21 July 1972, as amended, and Respondents Notice No R1648 of 19 August 1977, as amended, having been complied with.

Commissioner of Oaths

SABELO SIYABONGA GIVEN DLAMINI
COMMISSIONER OF OATHS
PRACTISING ATTORNEY, RSA
FASKEN MARTINEAU
INANDA GREENS
54 WIERDA ROAD WEST
SANDTON

IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION, PRETORIA

Case no: 41661/15

In the matter between:

The Chamber of Mines of South Africa	Applicant
and	
Minister of Mineral Resources	First Respondent
Director-General, Department of Mineral Resources	Second Respondent

---

SUPPORTING AFFIDAVIT

I, the undersigned

TARYN HARMSE

hereby say on oath that:

1 **Deponent**

1.1 I am the Executive Vice President: General Counsel of Gold Fields Limited ("**Gold Fields**"). I am duly authorised to represent Gold Fields and to depose to this affidavit on its behalf.

1.2 The facts in this affidavit are true and correct and, unless otherwise stated or the contrary appears from the context, are within my personal knowledge. Legal submissions in this affidavit are made on the advice of the Gold Fields' legal advisors.

1.3 I have read the founding affidavit and the replying affidavit deposed to by Ambrose Vusumuzi Richard Mabena of the Chamber of Mines. I confirm the correctness of the replying affidavit insofar as it relates to Gold Fields. I have also read the answering affidavit of second respondent, Thibedi Ramontja filed on behalf of both the respondents and deny the correctness thereof insofar as it relates to Gold Fields for the reasons outlined below. The respondents, in paragraphs 90 to 93 and 110 of their answering affidavit, make particular reference to the case of Gold Fields. The respondents' allegations are, however, not correct. The following response is made in this regard.

2 **Ad paragraph 90 to 93**

2.1 It is correct that Mvela is no longer part of Gold Fields or the Gold Fields Group. It is also true that Sibanye is no longer part of the Gold Fields Group. Gold Fields is a holding company and does not hold any mining rights in its own name. It has nevertheless continued to report to the DMR on the initiatives it undertook in order for the Gold Fields Group to fulfil the transformation objectives of the MPRDA and the Charters. It is correct that Gold Fields claimed credit, inter alia, for "effecting the entry of HDSA's into the mining industry" and "encouraging greater ownership

of mining industry assets by HDSA's" by virtue of the steps taken to re-structure itself to enable the entry of Mvela into the Gold Fields Group. In fact, prior to the unbundling of, what is today, Sibanye (then GFI Mining South Africa Proprietary Limited ("GFIMSA")), Gold Fields entered into a number of empowerment transactions between 2004 and 2010 for the purpose of facilitating substantial and meaningful HDSA participation generally within the mining industry and more specifically within the Gold Fields Group.

2.2 The Gold Fields Group, in consultation with the DMR during the course of 2003, resolved to re-structure itself in such a way that would facilitate the objects of the MPRDA, once promulgated, and to ensure the conversion of its mining licences (then governed by the provisions of the predecessor to the MPRDA, the Minerals Act 50 of 1991) in accordance with the MPRDA. So, for example, during the first quarter of 2004, members of the Gold Fields Group entered into a transaction with Mvela in terms of which it agreed, *inter alia*, that GFIMSA, a wholly owned subsidiary of Gold Fields, would acquire all of the Gold Fields Group's South African gold mining and ancillary assets and operations including its Kloof, Driefontein and Beatrix Gold mines.

2.3 It was further agreed that in order to fund the acquisition of these assets, Mvelaphanda Gold Proprietary Limited ("Mvela Gold"), a wholly owned subsidiary of Mvela, would advance a loan of R4,139 billion to GFIMSA on 17 March 2004 ("GFIMSA loan"). The entire GFIMSA loan was

applied by GFIMSA towards partial settlement of the consideration payable by it for the aforesaid South African gold mining and ancillary assets and operations.

2.4 The GFIMSA loan bore interest and was repayable in full on 17 March 2009. Simultaneously with such repayment, Mvela Gold was required to apply the proceeds of such loan repayment (in the amount of R4,139 Billion) to subscribe for 15% of the issued share capital of GFIMSA.

2.5 Mvela Gold and Gold Fields had the right to require the exchange of Mvela Gold's 15% interest in GFIMSA for the issue to Mvela Gold of listed shares in Gold Fields having an equivalent value. Gold Fields and Mvela Resources subsequently agreed that 50 000 000 ordinary shares in Gold Fields would equate to 15% of GFIMSA. Accordingly on 17 March 2009, Mvela Gold was entitled to exchange its 15% interest in GFIMSA for the issue to Mvela Gold of 50 000 000 new ordinary shares in Gold Fields, equating to approximately 7% of its increased issued shares.

2.6 Mvela Gold funded the GFIMSA loan through a combination of (i) Bank Debt (R1.349 billion), (ii) Mezzanine Debt (R1.1 billion) and (iii) a private placement of Mvela Resources shares (R1.69 billion).

2.7 Gold Fields facilitated the Mvela transaction by participating in all three levels of funding referred to in paragraph 2.6 above by providing:

2.7.1 a fixed interest income stream that allowed the Bank Debt to be amortized over 5 years;

2.7.2 R200 million of the Mezzanine Debt and guaranteeing R150 million of the Public Investment Corporation's ("PIC") loan to Mvela Gold; and

2.7.3 a R100 million investment in Mvela Resources as part of the equity raising which Mvela Resources undertook to raise finance for the transaction.

2.8 As stated above, as part of the Mvela transaction, the three Gold Fields mines, namely Beatrix, Kloof and Driefontein, were transferred to GFIMSA prior to 1 May 2014 and the old order rights related to these mines were converted during January to February 2007 on the basis of the Mvela transaction satisfying the HDSA ownership target in the Original Charter.

2.9 On or about 2011, Mvela finally sold its shares in Gold Fields and exited the then Gold Fields Group. Mvela utilised the proceeds from the sale of such shares to purchase Northam Platinum in the pursuit of the object of substantial and meaningful HDSA participation in the mining industry.

2.10 If Gold Fields was the measured entity at any material time for the purposes of the Charters, the 15% credit is claimed for the fact that it had facilitated the acquisition by an HDSA of 15% of the ordinary shares of Sibanye (then named GFIMSA) and that Sibanye continued to benefit

from such empowerment initiative, subsequent to the immediate "flip up" for equal value of shares in Gold Fields, owing to the application of the accepted "flow-through" or "see through" principle. Gold Fields does not claim the 15% ownership by operation of the "once empowered always empowered" concept but rather because, if it is regarded as the measured entity, when the Minister decided to convert Sibanye's old order mining rights, he considered (correctly) that the conversion of the rights would achieve the objects of empowerment within the Gold Fields Group. Having so converted the rights, there is no "double counting" because, as the Chamber contends, there is no imperative to again assess the level of empowerment after a mining right has been granted.

3 **Ad paragraph 110**

3.1 In response to the allegations in paragraph 110, the following is stated.

3.2 If Gold Fields is the entity to be measured in relation to the conversion of the old order rights relating to the Beatrix, Kloof and Driefontein mines, then it is correct in claiming the 15% credit because HDSA participation in those rights were demonstrated at the time they were converted. The objects of the MPRDA will have been met by the Gold Fields Group in relation to the mining rights so converted, at the time when they were converted. Subsequent corporate actions, such as the unbundling of Sibanye, is of no significance because Gold Fields, if it is regarded as the measured entity, was under no obligation to maintain a certain level of HDSA ownership for the duration of the said converted mining rights.

TARYN HARMSE

I hereby certify that the deponent has acknowledged that he/she knows and understands the contents of this affidavit, which was signed and sworn to before me at SANDTON on the 9TH day of September 2015, the regulations contained in Government Notice No R1268 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

Full Names: SARAH LEIGH PINDER

Sarah Leigh Pinder
155 - 5th Street
Sandown, Sandton, 2196

Commissioner of Oaths
Ex-Officio / Practising Attorney R.S.A.

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 41661/15

In the matter between:

The Chamber of Mines of South Africa Applicant

and

Minister of Mineral Resources First Respondent

Director-General, Department of Mineral Resources Second Respondent

---

CONFIRMATORY AFFIDAVIT IN SUPPORT OF APPLICANT'S REPLYING AFFIDAVIT

I, the undersigned,

BUNONGOE HARTLEY DIKGALE

do hereby make oath and state that:

1 I am an adult male and the Senior Vice- President: General Counsel of Sibanye Gold Limited (hereinafter referred to as "Sibanye") employed at Sibanye's place of business at 1 Hospital Street, Libanon, Westonaria, Gauteng. I am duly authorised to

depose to this affidavit on behalf of Sibanye.

2 Save as where otherwise stated or the context indicates the contrary, the facts contained in this affidavit are within my own personal knowledge and are to the best of my belief all true and correct.

3 I have read and considered the replying affidavit of Mr Ambrose Vusumuzi Richard Mabena (hereinafter referred to as the "Replying Affidavit") in the above application and I confirm the contents thereof insofar as they relate to Sibanye in paragraphs 28.8, 28.9 and 37 of the Replying Affidavit.

4 Paragraph 10 of the Replying Affidavit refers to the references in the answering affidavit of the Respondents (hereinafter referred to as the "Answering Affidavit") to certain empowerment transactions concluded by individual members of the Applicant and indicates that the relevant companies will respond to the allegations made against them in the Answering Affidavit.

5 I proceed to deal with the contents of the Answering Affidavit to the extent that it is necessary for me to do so. To the extent that any particular allegation is not dealt with by me and which is in conflict with what is contained in this affidavit, then such allegation must be taken to be denied.

Ad paragraph 93

5.1 The Respondents aver that "*Mvela is not part of Sibanye. Sibanye is claiming 15% arising out of a transaction that Gold Fields has concluded with Mvela. This it does through application of the "once empowered, always empowered concept.*".

5.2 It is correct that Mvela is not part of Sibanye. In 2004 and whilst Sibanye (then GFIMSA) was still part of the Gold Fields Group, Mvela and Gold Fields concluded a transaction in terms of which Mvela acquired 15% of Sibanye. On or about 17 March 2009 Mvela exchanged its shares in Sibanye (then GFIMSA and part of the Gold Fields Group) for shares in Gold Fields. On or about 2011 Mvela finally sold its shares in Gold Fields and exited the then Gold Fields Group.

5.3 Based on publically available information, I am made to understand that Mvela utilised the proceeds from the sale of such shares to capitalise Northam Platinum Limited in the pursuit of the object of substantial and meaningful HDSA participation in the mining industry.

5.4 It is further correct that Sibanye is claiming a 15% credit arising out of the transaction concluded between Mvela and Gold Fields whereby in 2004 Mvela subscribed to 15% of the ordinary shares in Sibanye (then GFIMSA). Sibanye is so claiming because at all relevant times, being 2004 when the Mvela transaction was concluded, 2009 when Mvela exchanged its Sibanye shares for shares in Gold Fields, 2011 when Mvela exited the Gold Fields group and now, Sibanye was and remains the measured entity and a holder of mining titles. In other words, Sibanye claims the 15% because in fact, the Mvela transaction was structured to empower Sibanye so that it could convert the old order mining rights that it had.

5.5 On 27 November 2012 GFIMSA changed the company's name to Sibanye. The company registration number remained the same as the company continued in existence as a legal entity but with a new name. Simultaneously

with the change of name GFIMSA changed its status to that of a public company as its new name reflects.

5.6 The 15% credit is claimed for the fact that an HDSA had acquired ownership of 15% of the ordinary shares of Sibanye (then named GFIMSA). Sibanye does not claim the 15% ownership by operation of the "*once empowered always empowered*" concept but rather because when the Minister decided to convert Sibanye's old order mining rights he considered (quite correctly) that the conversion of the right would achieve the objects of empowerment. Moreover, in fact the transaction did lead to the empowerment of Mvela as an HDSA company. It profited from the transaction by acquiring the shares in Sibanye and realising the value of those shares when they were later sold. This was in fulfilment of the objects of the MPRDA and specifically the object in section 2(d).

5.7 It should moreover be pointed out that when the Minister acting in terms of item 7(2)(k) of the transitional provisions decided that to convert Sibanye's old order mining rights would be to give effect to the object in section 2(d), the relevant requirement as to HDSA ownership against which the Minister measured that decision then stood at 15%.

Ad paragraph 111

5.8 The First and Second Respondents aver that "*Harmony claims 15% credit through the Mvela transaction arising out of Sibanye being a shareholder in Rand Uranium, a subsidiary of Harmony*" and that may be "*triple dipping*". The assertion that "*triple dipping*" occurred is based on entirely erroneous

factual allegations.

5.8.1 Firstly, Rand Uranium is a subsidiary of Sibanye and is not a subsidiary of Harmony.

5.8.2 Second, the Director-General is under the misapprehension that there is only a single empowerment transaction with Mvela. That is incorrect. There are two entirely separate empowerment transactions which involve Mvela. The first is the 15% transaction with Mvela involving Gold Fields and Sibanye (then named GFIMSA) which was concluded in 2004 and in respect of which Sibanye claims a 15% credit. The second is a 23.4% transaction concluded between Mvela and Rand Uranium which was concluded on 14 August 2012 and in respect of which Sibanye does not seek to claim any empowerment credits. Rand Uranium claims a 23.4% empowerment credit arising out of that transaction. Rand Uranium therefore has its own and entirely separate empowerment transaction in place with Mvela.

Deponent

THUS SIGNED AND SWORN TO BEFORE ME at SANDTON on this 09TH day of SEPTEMBER 2015 the deponent having acknowledged that he/she knows and understands the contents of this affidavit, that the deponent has no objection to taking the prescribed oath,

that the oath which the deponent has taken in respect thereof is binding on the deponent's conscience, and that the contents of this affidavit are both true and correct.

COMMISSIONER OF OATHS

Athi Vuyolwethu Jara
Commissioner of Oaths
Practising Attorney SA
ENSafrica
150 West Street
Sandown Sandton 2196

386

IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION, PRETORIA

Case no:

In the matter between:

The Chamber of Mines of South Africa Applicant

and

Minister of Mineral Resources First Respondent

Director-General, Department of Mineral Resources Second Respondent

---

SUPPORTING AFFIDAVIT

I, the undersigned

FRANK ABBOTT

hereby say on oath that:

1 **Deponent**

1.1 I am the Financial Director of Harmony Gold Mining Company Limited ("**Harmony**"). I am duly authorised to represent Harmony and to depose to this affidavit on its behalf.

SB AA

1.2 The facts in this affidavit are true and correct and, unless otherwise stated or the contrary appears from the context, are within my personal knowledge. Legal submissions in this affidavit are made on the advice of the Harmony's legal advisors.

1.3 I have read the founding affidavit and the replying affidavit deposed to by Ambrose Vusumuzi Richard Mabena of the Chamber of Mines. I confirm the correctness of the replying affidavit insofar as it relates to Harmony. I have also read the answering affidavit of second respondent, Thibedi Ramontja filed on behalf of both the respondents and deny the correctness thereof insofar as it relates to Harmony for the reasons outlined below. The respondents, in paragraph 111 of their answering affidavit, make particular reference to the case of Harmony. The respondents' allegations are, however, not correct. The following response is made in this regard.

2 **Ad paragraph 111**

The respondents are respectfully mistaken in their assertion and nothing more can be said but to record our denial. Harmony has simply never claimed any percentage of credit for any transaction that Mvela may have concluded with any third party. Harmony denies having ever entered into any transaction with Mvela and denies having ever claimed any ownership credit for participating in such a transaction.

FRANK ABBOTT

I hereby certify that the deponent has acknowledged that he/she knows and understands the contents of this affidavit, which was signed and sworn to before me at Sandton on the 9th day of September 2015, the regulations contained in Government Notice No R1268 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

Full Names:

SAMANTHA LEXINE BRENER
COMMISSIONER OF OATHS
EX OFFICIO
PRACTISING ATTORNEY RSA
1 PROTEA PLACE, SANDTON, JOHANNESBURG